

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



76-7520

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

DOCKET NO. 76-7520

MERLE W. LEONARD,

Plaintiff-Appellant,

v.

REYNOLDS SECURITIES, INCORPORATED, J.C.  
BRADFORD & COMPANY, VOGEL LORBER, INCORPORATED  
JOSEPH EZRA & COMPANY, INCORPORATED, GOLDNICK  
& SON, INCORPORATED and SAMUEL GOMBERG,

Defendant-Appellees.



APPELLANT'S REPLY BRIEF

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Defendants-Appellees.

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APPELLANT'S REPLY BRIEF

Statement

Appellant submits this brief in reply to the  
opposing brief of appellees.

Appellees' defense of the lower court's summary  
denial of appellant's class motion is neither  
justified in fact nor in law.

POINT I

THE ABSENCE OF A RETURN DATE  
FROM PLAINTIFF'S ORIGINAL CLASS  
ACTION MOTION IS IRRELEVANT UNDER  
THE CIRCUMSTANCES

Appellees argue that the first motion for  
class determination could properly be ignored by the  
District Court because the motion had no return date,  
nor was it filed with the Clerk (except three years

later on June 21, 1976).

Appellees do not dispute - and, indeed, they cannot - the fact that they received the motion and failed to respond to that motion. They do not dispute - and, indeed, they cannot - the fact that the District Court received the motion and failed to act thereon. Appellees do not dispute - and, indeed, they cannot - the fact that appellant repeatedly entreated the District Court to act upon his motion for class determination. As to the latter, they content themselves with claiming that such entreaties were "outside the record." But this claim is untrue. The entreaties were often made orally in various appearances before the Court in connection with the other defendants' motion for summary judgment, and in repeated correspondence to the Court. The District Court referred to plaintiff's claim for class determination in its opinion in 64 FRD 432 at Page 434.

If error there was in failing to include a return date of the motion and "filing said motion," such error was harmless. Rule 61 FRCP commands:

"...The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Cf. United States v. State of Arizona, 346 U.S.  
967 (1953) reversing  
United States v. Arizona,  
206 F.2d 159 (9th Cir.1953)

The foregoing, of course, does not justify appellees ignoring the motion nor does it explain or justify the failure of the District Court to rule thereon.

It was, moreover, no error upon the part of appellant in failing to have a return date. The District Court (Pierce, J.) had a rule in 1973 which required that all motions be submitted and dispensed with the need for a hearing day unless the Court thereafter directed such a hearing day.

In Rose Barge Line, Inc. v. Hicks, 421 F.2d 163 (8th Cir. 1970), the Eighth Circuit considered the question of a local rule of the Eastern District of Arkansas which dispensed with the requirement of all hearings. The local rule permitted the submission and determination of motions without oral hearings unless the District Court would expressly order a hearing on a motion. Thus, that rule was akin to the practice of Judge Pierce. The Court held that a motion served without a hearing day, as here, did not violate the Federal Rules of Civil Procedure. It

held at page 164:

"Adoption of the local rule dispensing with hearings makes irrelevant and meaningless the notice of hearing required by Rule 6(d), Fed. R. Civ. P., unless the District Court expressly orders a hearing on a motion.

In this case the defendant did not give any notice of hearing as no hearing date was set. However, the defendant did mail to the plaintiff a copy of the motion with the supporting papers and the indicated filing date. The plaintiff thus had actual notice of the motion and full opportunity to respond thereto. Since no hearing date was set under the procedure adopted by the District Court, no notice thereof could be given and none is contemplated under the type of procedure."

In the cited case, plaintiff, as appellees here, conceded receiving the motion and failed to respond. The plaintiff justified, as appellees do here, their failure to respond by claiming the motion was defective in omitting a "return date." The Circuit Court held plaintiff to have been properly in default and affirmed a judgment of dismissal.

The failure to file the motion with the Clerk is not fatal to appellant. He physically delivered the papers to the Judge, and that is sufficient compliance with Rule 5(e) FRCP; 4 Wright & Miller Federal Practice and Procedure, Section 1153, page 600.

Indeed, Rule 5(e) permits papers to be filed with the Judge and requires that he note thereon, the filing date "and forthwith transmit them to the Office of the Clerk."\*

In any event, the failure to file with the Clerk cannot justify appellees' failure to answer the motion nor the District Court's failure to rule thereon.

#### POINT II

##### PLAINTIFF IS AN ADEQUATE CLASS REPRESENTATIVE

Appellees argue that appellant was an inadequate representative, totally ignoring the context of the discovery disputes. Their argument cannot withstand analysis.

At the outset, appellees' charge that appellant failed to execute the transcript of his deposition is a false issue. Appellant received only one copy - contrary to the stipulation of the parties and did not receive the original transcript for execution.

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\*The Court filed the papers which had concededly been delivered to it, three years later on June 21, 1976. (A 21). The Court's delay cannot be blamed upon appellant.

Even if he had, and refused to sign the transcript, Rule 30(e) FRCP provided appellees with all of the remedies. It called for a certification by the officer taking the deposition and provides that "... the deposition may then be used as fully as though signed...."

The transcript of deposition contains an appropriate certification by the officer taking the deposition; thus, it is solely due to appellees' conduct which caused the transcript not to be filed. It should be noted, however, that appellees make no reference to any testimony in the transcript in their opposition to class determination submitted in this Court, or, at any time, below.

Appellees argue that appellant failed to respond to interrogatories for eighteen months. This argument comes with particular ill grace. For it was approximately eighteen months after plaintiff furnished answers that defendants suddenly decided the need for discovery. On its face this discovery was not to elicit information but to harass. Here, the defendants embarked upon a program of delay and the Court erroneously allowed it to happen.

Appellees have had full answers to the interrogatories, and as can be seen from their opposing brief here, not one of the answers (which they claim was necessary to defeat class action) appears in their opposition to class action status.

It is equally untrue to claim that appellant did not answer the interrogatories for eighteen months. He submitted responsive answers timely. What remained unanswered were those questions as to which there were substantial dispute as to the right of the appellees to ascertain this information. As we are shown in our main brief (Pages 14, 22-26) there is substantial authority to support appellant's original refusal to answer.

Magistrate Goettel recognized the foregoing, and it is disingenuous for appellees to argue that his holding - quoted by us in our main brief - was a single reference "taken out of context." Indeed, the crux of his decision (A - 174-5) is predicated on ascertaining the size of the class. Appellees implicitly admit as much for their opposition to class determination in this Court raises the question of just how many people are in the class. (See Appellees' Brief, PP 12-13).

In any event, after appellant exhausted his various remedies, these answers were supplied and appellees make no reference to them in connection with their opposition.

Appellees' attack upon Mr. Bizar and the conduct of Zolotnitzky v. Yablok affords no justification for the District Court's order.

In the first place, it is counsel's conduct in the present case that is the criterion and not what was done in some case long past.

Secondly, if that conduct was to be an issue in the case, notice thereof should have been given to Mr. Bizar with an ample opportunity to defend the claims. Korn v. Franchard Corporation, 456 F.2d 1206, 1208 (2d Cir. 1972).

Had Mr. Bizar been given notice of this issue, he would have been able to defend the claim and point out that the difficulties cited by the District Court in that case arose from factors not within Mr. Bizar's control, but out of certain

procedures delineated by the District Court and then subsequently removed.\*

### POINT III

#### APPELLANT MEETS THE REQUIREMENTS OF RULE 23 AND APPELLEES' DISTINCTIONS CANNOT DENY CLASS STATUS

As can be expected from parties anxious to defeat class action status, appellees have invented a series of claimed distinctions and differences which they argue would cause class status to be denied. In fact, quite the contrary is true.

#### 1. Manageable Class

Under the guise of arguing non-manageability, appellees contest our definition of a class, arguing that the definition is too amorphous.

Manageability is generally thought to be a question in cases involving large numbers of members of a class. See, e.g., Hackett v. General Host Corp., ('72 Trade Cases ¶73,879)(E.D.Pa. 1970) appeal dismissed. 445 F.2d 618; United Egg Producers v. Bauer International Corp., 311 F. Supp. 3375 (S.D.N.Y. 1970).

\* The other comment made by the District Court with respect to the granting of class action status in Zolotnitzky v. Yablok related to Mr. Bizar's predecessor counsel and not to him - a fact which appears in the opinion, at Page 988 of 18 F.R.Serv.2d.

At bar, appellant claims only 7500 to be in the class and appellees do not contest this number. Hence, manageability is not a factor.

While it may well be that some members of the class (purchasers of call options) may have made a profit or others may have exercised their option, that does not prevent class action status. Those who made profits, and those who exercised their options and acquired the underlying security, having suffered no loss, cannot recover. The latter consideration is a minor factor since the report of the Commission, Report on Put and Call Options (August 1961), p.6, reveals that 60% of all options purchased are never exercised. Hence, it is clear that purchasers of options generally keep them till they expire.

It may also be that many of the members of the class purchased options for purposes of profit - whether to hedge against other transactions or hopefully, engaging in a further transaction which would realize a profit to them. However, the motive or purpose of a purchaser of an unregistered security is irrelevant. Liability for violations of

Section 5 of the 1933 Act is absolute and exists irrespective of the motive or intent of the purchaser. See III Loss, Securities Regulation, Page 1693-4; Rosenberg v. Hano, 121 F.2d 818, 822 (3rd Cir. 1941). Cf. Diskin v. Lomasny & Co., 452 F.2d 871, 875-6 (2d Cir. 1971).

## 2. Numerosity

Appellees find a lack of numerosity because of their claim that each option is different from every other option. This issue was posited by Magistrate Goettel below, and its determination was to fix and decide the scope of inquiry into appellant's resources, etc. It is ironic that appellees now allege a lack of numerosity.

As noted in our main brief, we submit that all options are to be treated as one security, irrespective of the exercise price, the premium and the underlying stock, because as shown in the Commission's report, ibid the options are sold as part of a large sales operation without distinction as to the underlying security. All the approaches and sales techniques are standardized and since the registration question affects every class member in exactly the same way, we submit they are all to be treated alike.

While appellees argue that this makes for differences among the class members, they draw distinctions without differences. The distinctions such as these have not proved so serious that all options cannot be registered. Indeed, these options are sold today under a single prospectus on five different exchanges. Appellees have tried to defeat class action here by arguing that common questions exist only if a class exists. That misreads the rule. Under Rule 23 a class exists if common questions exist.

The sale of unregistered securities has frequently been the subject of class action determinations. See Morris v. Burchard, 51 FRD 530 (S.D.N.Y. 1971).

### 3. Common Questions

Appellees find common questions lacking because of the claimed issues surrounding exemptions. However, it is well settled that the matter of proving exemptions is the burden of a defendant. SEC v. Ralston Purina, 346 U.S. 119, 126 (1953); Hill York Corp. v. American International Franchises, 448 F.2d 680, 686, 690 (5th Cir. 1971).

Defendants' defenses do not preclude class status. See Lamb v. United Security Life Company, 49 FRD 25 (S.D. Iowa 1972) DeMelia v. Cybernetecs Int'l. Corp., 15 F.R.Serv. 2d 1385 (S.D.N.Y.1972).

4. Privity

Appellees argue that there are questions of privity. The argument fails for two reasons.

In the first place, the District Court's prior decision removes all such considerations. It determined that appellees are the ones who dealt in options with appellant and all option transactions entered into by these parties are the subject of the suit.

Secondly, there is no requirement of strict privity. See Katz v. Amos Treat & Co., 411 F.2d 1046 (2d Cir.1969). Any party who participated in the sale is liable even though the actual security is not purchased from that party.

Finally, it may well be that some members of the class will not be entitled to a recovery at the conclusion of trial and the presentation of claims. That fact does not warrant denial of class

action status. See Tucker v. Arthur Anderson & Co.,  
67 FRD 468, 482 (S.D.N.Y. 1975).

CONCLUSION

This Court should reverse the order of the  
district court and remand this case to proceed as  
a class action on behalf of all persons who purchased  
call options from defendants during the period  
November 29, 1971 to November 29, 1972.

Respectfully submitted,

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IRVING BIZAR  
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STATE OF NEW YORK )

: SS.:

COUNTY OF NEW YORK)

MARJORIE BIRD , being duly sworn, deposes and

I am not a party to the action, am over the age

On February 3, , 1977, I served the within

Appellant's Reply Brief

upon the party therein named by mailing the same to said party or to his attorney at the address designated by him for that purpose, by depositing a true copy thereof in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State, as follows:

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Rayone B. Bird

Sworn to before me this  
3rd day of February , 1977

Michael B. Boring  
Notary Public

MILDRED B. HOWES  
NOTARY PUBLIC, State of New York  
No. 41-1850362 Queens County  
Certificate filed in New York County  
Term Expires March 30, 19\_\_\_\_

